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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CARLEEN JOYCE MONTOYA, Appellant.	2 CA-CR 2009-0286 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20063345

Honorable Hector Campoy, Judge

AFFIRMED

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E S P I N O S A, Presiding Judge.

¶1 After a jury trial, Carleen Montoya was convicted of possession of a narcotic drug and possession of drug paraphernalia. The trial court sentenced her to

concurrent, mitigated terms of imprisonment, the longer of which was 3.5 years. On appeal, Montoya contends her indictment was duplicitous and the court erred by denying her pretrial motion to suppress. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). Additionally, in reviewing the denial of a motion to suppress, we view the facts in the light most favorable to sustaining the trial court's ruling, considering only the evidence presented at the suppression hearing. *State v. Box*, 205 Ariz. 492, ¶ 2, 73 P.3d 623, 624 (App. 2003). In the early morning of August 30, 2006, Tucson police officer Azuelo received a "check welfare" request concerning a woman observed "passed out" in a car in a grocery store parking lot. Azuelo drove up to the vehicle, and, upon checking the status of its license plate, learned the vehicle was "not available for highway use." As Azuelo approached the car on foot, Montoya emerged from the passenger side. Azuelo noted she was acting "very lethargic, very dizzy, [and] disoriented." Although Montoya admitted she was feeling dizzy, she declined his offer to summon medical assistance.

¶3 Azuelo obtained Montoya's name, although he could not remember if she told it to him or instead gave him an identification card, and he ran a "wants and warrants" check, which revealed an outstanding warrant for her arrest. He arrested and searched Montoya and, in a container in her pocket, found a white rock substance later

determined to be crack cocaine. Azuelo then looked inside the vehicle and saw on the passenger seat what appeared to be a glass "crack pipe" used for smoking crack cocaine. Montoya subsequently was charged with possessing both a narcotic drug and drug paraphernalia.

¶4 Before trial, Montoya moved to suppress the evidence obtained from what she asserted was an illegal seizure. After an evidentiary hearing, the trial court denied her motion, determining that the "encounter and exchange . . . [had been] totally consensual and voluntary." After being convicted and sentenced as outlined above, Montoya brought this appeal. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).[1]

Discussion

Duplicitous Indictment

¶5 Montoya first argues her indictment was duplicitous, resulting in fundamental, reversible error. Count one of the indictment alleged that Montoya "unlawfully possessed[] drug paraphernalia, to wit: container and/or pipe." A

[1]Although Montoya's trial took place in 2007, she absconded and was not sentenced until after her arrest on an unrelated matter in 2009. The state argues this court lacks jurisdiction over this appeal pursuant to A.R.S. § 13-4033(C) because Montoya's absence prevented her sentencing from occurring until more than two years after her convictions and she did not prove her absence was involuntary. However, as the state acknowledges, in *State v. Soto*, 223 Ariz. 407, ¶ 14, 224 P.3d 223, 228 (App. 2010), this court found § 13-4033(C) unconstitutional except when the state "establish[es] that a defendant's voluntary failure to appear timely for a sentencing hearing demonstrates a knowing, voluntary, and intelligent waiver of his constitutional right to appeal." Because there has been no such showing here, we address the merits of Montoya's appeal.

duplicitous indictment, which charges more than one offense within a single count, *State v. Ramsey*, 211 Ariz. 529, ¶ 6, 124 P.3d 756, 759 (App. 2005), is "'forbidden because it does not provide adequate notice of the charge to be defended, . . . present[s] a hazard of a non-unanimous jury verdict, and . . . make[s] a precise pleading of prior jeopardy impossible in the event of a later prosecution,'" *State v. Paredes-Solano*, 223 Ariz. 284, ¶ 17, 222 P.3d 900, 906 (App. 2009), *quoting State v. Davis*, 206 Ariz. 377, ¶ 54, 79 P.3d 64, 76 (2003).

¶6 Because Montoya did not present this issue to the trial court, her claim can be reviewed only for fundamental error. "Objections to an indictment must be raised at least twenty days before trial, and the failure to do so forfeits the objection absent fundamental error." *Paredes-Solano*, 223 Ariz. 284, ¶ 6, 222 P.3d at 903 (citations omitted). "'To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in [her] case caused [her] prejudice.'" *Id.* ¶ 8, *quoting State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). Fundamental error may occur when the jury's determination "may have been other than unanimous," *Davis*, 206 Ariz. 377, ¶ 66, 79 P.3d at 77, but "the error potentially resulting from . . . a[] [duplicitous] indictment may be cured when the basis for the jury's verdict is clear," *Paredes-Solano*, 223 Ariz. 284, ¶ 17, 222 P.3d at 906; *see also State v. Petrak*, 198 Ariz. 260, ¶ 28, 8 P.3d 1174, 1182 (App. 2000) ("[I]f the defendant suffers no prejudice from the duplicitous indictment, we need not reverse the conviction.").

¶7 Montoya contends that count one of the indictment was duplicitous in identifying the paraphernalia allegedly possessed as "container and/or pipe," and she maintains this phrasing constituted fundamental error because it deprived her of a unanimous jury verdict. The state counters that Montoya was not subjected to the possibility of a non-unanimous verdict because, "[i]n finding [her] guilty of possessing the crack cocaine, the jury necessarily and unanimously found that [she] possessed the container in which the cocaine was found," thus "a unanimous verdict on the charge of possession of the container was implicit in the unanimous verdict on the charge of possession of crack cocaine, regardless of whether the jury believed [she] possessed the pipe."

¶8 Assuming the indictment is duplicitous, we agree with the state that Montoya was not prejudiced. It is undisputed the crack cocaine was discovered inside a container that was one of two items listed in the paraphernalia charge, and Montoya does not challenge the container's status as drug paraphernalia. *See* A.R.S. § 13-3415(A). Accordingly, because the jury found her guilty of possessing the cocaine, it necessarily also found she possessed the container. Even if fewer than all of the jurors believed she had also possessed the pipe, there was still no possibility of a non-unanimous verdict on her possession of the container as an item of paraphernalia.[2] *See State v. Schroeder*, 167 Ariz. 47, 52-53, 804 P.2d 776, 781-82 (App. 1990) (error cured where jury verdict

[2]Montoya's assertion that "inconsistent jury verdicts and compromises are possible . . . and may have occurred here" is insufficient to refute this conclusion.

conclusively demonstrated unanimity); *cf. Paredes-Solano*, 223 Ariz. 284, ¶ 19, 222 P.3d at 907 (rejecting state's argument that conviction on different count supported conviction on duplicitous count because there was "no basis upon which we could conclude as a matter of law that the jury necessarily reached this conclusion"); *Klokic*, 219 Ariz. 241, ¶ 30, 196 P.3d at 851 (given duplicitous charge, there existed "a distinct possibility that the jury was not unanimous as to the act or acts that gave rise to [defendant]'s criminal liability," requiring reversal).

Motion to Suppress

¶9 Montoya also contends the trial court erred by denying her motion to suppress the cocaine and paraphernalia. In reviewing the denial of a motion to suppress, "[w]e review the court's decision 'for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo.'" *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007), *quoting State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006). We will affirm the court's ruling "if legally correct for any reason supported by the record." *State v. Childress*, 222 Ariz. 334, ¶ 9, 214 P.3d 422, 426 (App. 2009).

¶10 Montoya does not dispute that Azuelo was justified in performing a welfare check but maintains he unconstitutionally detained her while running a "wants and warrants" check on her name. She asserts that "[a] reasonable person would feel she was not free to leave when a police officer went to check for wants and warrants." She further argues there was no reasonable, articulable suspicion warranting her detention

because, even though Azuelo had determined the vehicle was not registered to be driven on public roads, "there was no testimony about what statute this [violated] or what the definition of [']public highway['] was." She also points out she "had been sleeping in a car parked in a private parking lot."

¶11 The state counters that a welfare check does not constitute a "seizure" for purposes of the Fourth Amendment, and even assuming Montoya had been detained, the detention was constitutional. The state argues the statute underlying the vehicular violation and the definition of 'public highway' are immaterial because Montoya "was in possession of [an] automobile that . . . was unauthorized to be driven," and "her physical condition—lethargy, disorientation, and admitted dizziness—created questions about her capability to drive safely."[3]

¶12 Under the circumstances here, where Azuelo was responding to reports of a person "passed out" in a car, observed Montoya to be disoriented and dizzy, and asked her questions as part of his investigation into her welfare, the trial court could correctly determine the encounter was consensual. *See State v. Jones*, 188 Ariz. 388, 395, 937 P.2d 310, 317 (1997) (police may conduct welfare checks based on reasonable belief that person needs immediate assistance). Montoya concedes that no seizure occurs for purposes of the Fourth Amendment when an officer merely asks questions and requests identification, and she advances no colorable argument or authority for the notion that

[3]The state also points to the fact that the vehicle did not belong to Montoya, but this was not elicited at the suppression hearing, and therefore we do not consider it. *See Box*, 205 Ariz. 492, ¶ 2, 73 P.3d at 624.

Azuelo's conducting a routine check of her name against police records exceeded the reasonable scope of a welfare check. *See Hiibel v Sixth Jud. Dist. Court,* 542 U.S. 177, 186 (2004) (obtaining suspect's name during stop "serves important government interests" such as determining if suspect "is wanted for another offense, or has a record of violence or mental disorder").

¶13 Moreover, even assuming Montoya was seized for purposes of the Fourth Amendment, "a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further." *State v. Teagle*, 217 Ariz. 17, ¶ 20, 170 P.3d 266, 271-72 (App. 2007) ("[A] police officer may make a limited investigatory stop in the absence of probable cause if the officer has an articulable, reasonable suspicion, based on the totality of the circumstances, that the suspect is involved in criminal activity."). "We undertake a two-step inquiry to determine the constitutionality of an investigative detention." *Teagle*, 217 Ariz. 17, ¶ 27, 170 P.3d at 273. We must first decide "whether the police officer's action was justified at its inception" and then consider "whether the action was reasonably related in scope to the circumstances that justified the interference in the first place." *Id.*

¶14 As noted above, the evidence presented at the suppression hearing demonstrated that Azuelo had responded to the grocery store parking lot to check on a person reportedly unconscious in a car. Upon arrival, he routinely checked the license plate and determined the vehicle was "not available for highway use." He also observed

that its sole occupant, Montoya, was lethargic, dizzy, and disoriented. Azuelo's limited detention of Montoya to investigate her physical condition and identity was "justified at its inception" and "reasonably related in scope to the circumstances that justified the interference in the first place." *Teagle*, 217 Ariz. 17, ¶ 27, 170 P.3d at 273; *see* A.R.S. § 28-1594 (officer may detain person to investigate actual or suspected violation of transportation code); *Hiibel*, 542 U.S. at 186 (important interests served by obtaining suspect's name during stop); *Schade v. Dep't of Transp.*, 175 Ariz. 460, 461, 857 P.2d 1314, 1315 (App. 1993) (defendant tested for intoxication after appearing "confused and disoriented").

¶15 Montoya also argues, however, that, because the vehicle "was found in a parking lot, not on a public highway," there could be no justification for the stop "[w]ithout a statute stating that a parking lot constituted a public highway." And she asserts that, because "no one reported that [she] had been seen driving the vehicle and [she] exited the passenger side," "there was no indication that she was the driver of the vehicle." We find these arguments unavailing in light of the facts that the vehicle was located in a grocery store parking lot, accessible from public streets, and that Azuelo, finding Montoya alone in the vehicle, could have assumed she had been or would be driving, or both. *See Adams v. Williams*, 407 U.S. 143, 146 (1972) ("A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."); *State v. Miller*, 112 Ariz. 95, 97, 537 P.2d 965,

967 (1975) (law enforcement officers have "duty to be alert to suspicious circumstances and to investigate if necessary").

¶16 Accordingly, we conclude the totality of the circumstances justified Montoya's brief detention and the trial court did not err in denying her motion to suppress evidence.

Disposition

¶17 For the foregoing reasons, Montoya's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge